

NOV 2 2006

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2006 NOV -2 A 11: 49

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5743

DATE COMPLAINT FILED: 05/02/2006

DATE OF NOTIFICATION: 05/09/2006

DATE ACTIVATED: 08/14/2006

STATUTE OF LIMITATIONS: May 2, 2011

COMPLAINANT:

Thomas Sawyer

RESPONDENTS:

Betty Sutton

Betty Sutton for Congress and Joseph Quolke, as
Treasurer

EMILY's List and Judy Lichtman, as Treasurer
OH Women Vote!, a project of EMILY's List

RELEVANT STATUTES:

2 U.S.C. § 441a

11 C.F.R. § 100.22(a)

11 C.F.R. § 100.29

11 C.F.R. § 109.21

11 C.F.R. § 100.23

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

This matter involves alleged coordination between Betty Sutton, a 2006 candidate for U.S. Representative from Ohio's 13th Congressional District, and EMILY's List, a political action committee. EMILY's List is registered with the Commission as a multicandidate political committee and supports Democratic, pro-choice female candidates. EMILY's List endorsed Sutton and actively supported her. Sutton won a contested Democratic primary in May over the Complainant, Thomas Sawyer.

Mr. Sawyer alleges that Betty Sutton and Sutton for Congress illegally coordinated communications with EMILY's List and their project, OH Women Vote!, in violation of the Act. To support his claims of coordination, Mr. Sawyer makes two assertions: 1) EMILY's List and Betty Sutton for Congress both use the same UPS store as their mailing address; and 2) photographs used in communications by OH Women Vote!, although similar and sometimes identical to photographs used on the Betty Sutton for Congress website, could only have been obtained through "material involvement" of Betty Sutton or Betty Sutton for Congress and, as such, are illegally coordinated and unlawful independent campaign expenditures.

As more fully set forth below, we recommend that the Commission find no reason to believe that Betty Sutton or the Betty Sutton for Congress committee knowingly received excessive contributions in the form of coordinated communications. Further, we recommend the Commission find reason to believe that EMILY's List may have violated 2 U.S.C. § 441a(a)(2)(A) but take no further action. Finally, because OH Women Vote! – A Project of EMILY's List appears not to be a separate legal entity but merely a program within EMILY's List, we recommend that the Commission dismiss the complaint as to OH Women Vote! – A Project of EMILY's List.

II. FACTUAL SUMMARY AND LEGAL ANALYSIS

The Act defines in-kind contributions as expenditures by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). A payment for a coordinated communication is an in-kind contribution to the candidate's authorized committee with which it is coordinated and must be reported as an expenditure made by that candidate's authorized committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-kind contribution, the costs of a

27044154019

1 coordinated communication must not exceed a political committee's applicable contribution
2 limits. *See* 2 U.S.C. § 441a.

3 To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a
4 three-pronged test: (1) the communication must be paid for by a person other than a Federal
5 candidate, a candidate's authorized committee, or political party committee, or any agent of any
6 of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c)
7 must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R.
8 § 109.21(d) must be satisfied. *See* 11 C.F.R. § 109.21(a).

9 **A. Payment Prong**

10 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.
11 EMILY's List admits that its OH Women Vote! project paid for the communications alleged to
12 have been coordinated. *See* EMILY's List Response at 2.

13 **B. Content Prong**

14 At all times relevant to this matter, the content prong was satisfied if the communications
15 at issue met at least one of four content standards: (1) a communication that was an
16 electioneering communication as defined in 11 C.F.R. § 100.29; (2) a public communication that
17 republished, disseminated, or distributed candidate campaign materials; (3) a public
18 communication containing express advocacy; or (4) a public communication, in relevant part,
19 that referred to a clearly identified federal candidate, publicly distributed or disseminated
20

27044154020

1 120 days or fewer before a primary or general election, and was directed to voters in the
2 jurisdiction of the clearly identified candidate. *See* 11 C.F.R. § 109.21(c).¹

3 The content prong of the coordination regulation is also satisfied. All of the alleged
4 coordinated communications provided by the Complainant contain express advocacy as defined
5 in 11 C.F.R. § 100.22(a) with either the phrase "Vote for Betty Sutton" or "Vote for Democrat
6 Betty Sutton." Accordingly, we now turn to an analysis under the conduct prong.

7 **C. Conduct Prong**

8 The Commission's regulations set forth five types of conduct between the payor and the
9 committee, whether or not there is agreement or formal collaboration, that can satisfy the
10 conduct prong. *See* 11 C.F.R. § 109.21(d). Only three of these standards are relevant here.² The
11 three standards – (1) request or suggestion, (2) material involvement, and (3) substantial
12 discussion – do not appear to be met, and the respondents sufficiently rebut the allegations that
13 are made. Because the standards are not met, there does not appear to be any coordinated
14 communication between EMILY's List and Betty Sutton or her campaign.

15 Under the first standard, the communication is coordinated if it "is created, produced, or
16 distributed at the request or suggestion of a candidate or an authorized committee," or if the
17 communication is created, produced, or distributed at the suggestion of the payor and the
18 candidate or authorized committee assents to the suggestion. *See* 11 C.F.R. § 109.21(d)(1). The

¹ In *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005), the Appellate Court affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation. The District Court had remanded the matter back to the Commission, but in a ruling subsequent to the remand, the District Court explained that the "deficient rules technically remain 'on the books,'" pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). In response to the *Shays* litigation, new regulations were promulgated by the Commission that became effective June 8, 2006. However, because the activity that is the subject of the complaint took place in May 2006, the prior regulation governs this matter.

² The complaint does not address the common vendor and former employee or independent contractor standards and they are specifically rebutted in the affidavits attached to the Betty Sutton and Betty Sutton for Congress response.

27044154022

1 second standard requires that the candidate, his or her committee, or their agents be materially
2 involved in the content, intended audience, means or mode of communication, the specific media
3 outlet used, or the timing or frequency of the communication. *See* 11 C.F.R. § 109.21(d)(2).
4 The third standard requires that the communication be created, produced, or distributed after at
5 least one substantial discussion about the communication between the person paying for the
6 communication, or that person's employees or agents, and the candidate or his or her authorized
7 committee, his or her opponent or opponent's authorized committee, a political party committee,
8 or any of their agents. A "substantial discussion" includes informing the payor about the
9 campaign's plans, projects, activities, or needs, or providing the payor with information material
10 to the communication. *See* 11 C.F.R. § 109.21(d)(3).

11 To support his allegations, the Complainant notes that Betty Sutton for Congress and OH
12 Women Vote! both use the same UPS store as their mailing address. The Complainant does not
13 indicate how this fact alone would indicate coordination among the Respondents. Indeed, the
14 response from Betty Sutton for Congress indicates that "[u]ntil this complaint was received from
15 the FEC, the Sutton Campaign did not know that EMILY's List maintained a post office box at
16 the UPS Store." *See* Sutton Response at 4. Therefore, this allegation, without more, does not
17 appear to support a finding of coordination between the involved parties.

18 The Complainant then compares several pairs of pictures found in the OH Women Vote!
19 direct mailers and on the Betty Sutton for Congress website and concludes that because in some
20 cases the photographs on the website were "not of sufficient photographic quality to have been
21 used to produce the image contained in" the mailers, the photos "could only have been obtained
22 through the 'material involvement'" of the Respondents.

1 However, the responses submitted by EMILY's List and the Sutton Committee provide
2 enough facts to sufficiently rebut the complaint. Julie Cutler, EMILY's List media consultant for
3 the Sutton campaign, has submitted an affidavit averring that she obtained the complained of
4 photographs directly from Betty Sutton for Congress' publicly available website and made any
5 alterations noticed by the Complainant. *See* Exhibit A to the EMILY's List Response.

6 Ms. Cutler states "neither Ms. Sutton, nor her campaign, nor any of her agents, provided me with
7 the photographs or helped me obtain them." *Id.* Affidavits submitted by Betty Sutton and Anna
8 Landmark, Betty Sutton's Campaign Manager, also clearly indicate that Betty Sutton or her
9 campaign had no material involvement or substantial discussion nor made any request or
10 suggestion to EMILY's List that would satisfy the conduct prong of coordinated
11 communications. *See* Declarations of Betty Sutton and Anna Landmark, attached to the Sutton
12 Response.

13 Further, EMILY's List indicates that a firewall has been created between EMILY's List
14 and OH Women Vote! such that OH Women Vote! employees, consultants and volunteers are
15 barred from interacting with federal candidates, political party committees, agents of the same,
16 and also from EMILY's List employees and volunteers regarding specified candidates.³ This
17 firewall was created "so as to prevent the flow of material information from candidates to the
18 Women Vote! program" and "to ensure compliance with the Commission's coordination
19 regulations at 11 C.F.R. Part 109." *See* EMILY's List Response at 2. In essence, EMILY's List

³ In its recent amendments to the coordinated communications regulations, the Commission created a safe harbor, new 11 C.F.R. § 109.21(h), for establishment and use of a firewall. In its Explanation and Justification of the new regulation, the Commission specifically acknowledged EMILY's List's firewall in MUR 5506, in which the Commission found no reason to believe that a violation occurred, as one that would specifically satisfy the Commission's requirements. *Coordinated Communications*, 71 *Fed. Reg.* 33190, 33206 (June 8, 2006). We have no information as to whether the firewall in this matter was "described in a written policy that is distributed to all relevant" personnel, new 11 C.F.R. § 109.21(h), but that provision was not in place at the times relevant here. The firewall here appears to have been identical in all material respects to the EMILY's List firewall in MUR 5506.

27044154023

1 states that there was a firewall between these two groups of EMILY's List workers in that the
2 staff assigned to work directly with the Sutton Committee had no discussions with the staff
3 assigned to OH Women Vote! about the communications at issue and imparted no knowledge or
4 information about the Sutton campaign to OH Women Vote! staff.

5 In short, the allegations set forth in the complaint regarding coordinated communications
6 are sufficiently rebutted by the Respondents. Accordingly, we recommend that the Commission
7 find no reason to believe that Betty Sutton or Betty Sutton for Congress and David Joseph
8 Quolke, in his capacity as Treasurer, violated the Act, and that the Commission dismiss the
9 complaint as to OH Women Vote! – A Project of EMILY's List.

10 **D. Republication by EMILY's List**

11 The Commission's regulations state that the republication of any graphic campaign
12 materials prepared by the candidate's authorized committee shall be considered a contribution
13 for the purposes of contribution limitations and reporting responsibilities of the person making
14 the expenditure. 11 C.F.R. § 109.23. The Explanation and Justification to this Regulation
15 provide an example of reproduction of a picture as being sufficient to constitute a contribution to
16 a candidate. See 68 Fed. Reg. 442, 443 (January 3, 2003). Furthermore, none of the exceptions -
17 to 11 C.F.R. § 109.23 appear to be applicable.

18 As part of its response to the Complaint, EMILY's List attached the affidavit of OH
19 Women Vote!'s media consultant, Julie Cutler. Ms. Cutler acknowledges that she "was
20 responsible for obtaining the photographs of Betty Sutton that we used in the direct mail
21 program" "on behalf of EMILY's List in early 2006 to help support the candidacy of Betty
22 Sutton in the Democratic primary in Ohio's 13th Congressional District." Ms. Cutler states that
23 she "obtained all of these photographs directly from Betty Sutton for Congress's publicly

27044154024

1 available website.” *Id.* Therefore, it appears that EMILY’s List may have made an in-kind
2 contribution to the Betty Sutton for Congress committee by republishing pictures in its direct
3 mailers that were obtained from the Betty Sutton for Congress website. However, Betty Sutton
4 or the Betty Sutton for Congress committee did not receive or accept an in-kind contribution, and
5 is not required to report an expenditure, because the republication was not a coordinated
6 communication under 11 C.F.R. § 109.21. 11 C.F.R. § 109.23.

7 EMILY’s List contributed the statutory maximum of \$5,000 to Betty Sutton for Congress
8 for the primary election; thus, any additional in-kind contribution would be excessive, in violation
9 of 2 U.S.C. § 441a(a)(2)(A). However, determining the amount of the excessive contribution is
10 problematic. Indeed, it is not clear that a photograph obtained from a publicly available website
11 without coordination with the candidate or her committee and inserted into EMILY’s List own
12 publication would have any more than *de minimis* value. Accordingly, because the excessive
13 contribution violation is clear, we recommend the Commission find reason to believe that
14 EMILY’s List violated 2 U.S.C. § 441a(a)(2)(A), but we also recommend the Commission
15 exercise its prosecutorial discretion and take no further action in this matter.

16 **E. Conclusion**

17 We recommend that the Commission find no reason to believe that Betty Sutton, Betty
18 Sutton for Congress, and David Joseph Quolke, in his official capacity as treasurer, violated the
19 Act, dismiss the complaint as to OH Women Vote! – A Project of EMILY’s List because it is not
20 an independent legal entity, and find reason to believe that EMILY’s List violated 2 U.S.C.
21 § 441a(a)(2)(A), but take no further action.

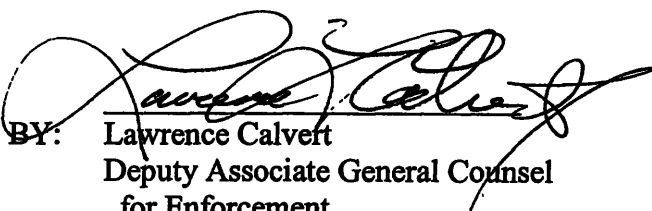
27044154025

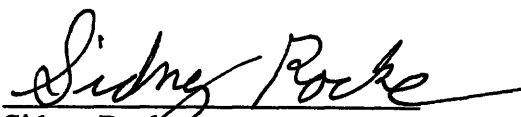
III. RECOMMENDATIONS

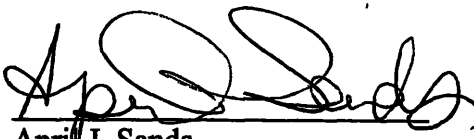
1. Find no reason to believe that Betty Sutton, Betty Sutton for Congress, and David Joseph Quolke, in his official capacity as treasurer, violated 2 U.S.C. § 441a by knowingly receiving excessive in-kind contributions in the form of coordinated expenditures.
2. Find reason to believe that EMILY's List and Judy Lichtman, in her official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) but take no further action.
3. Dismiss the complaint as to OH Women Vote! – A Project of EMILY's List.
4. Approve the appropriate letters.
5. Close the file.

Lawrence H. Norton
General Counsel

11/1/06
Date

BY: 
Lawrence Calvert
Deputy Associate General Counsel
for Enforcement


Sidney Rocke
Assistant General Counsel


April J. Sands
Attorney